

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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KAROLYN EASTMAN,

Plaintiff,

v.

**MEMORANDUM OF LAW & ORDER**  
Civil File No. 06-4123 (MJD/RLE)

THE PRUDENTIAL INSURANCE  
COMPANY OF AMERICA,

Defendant.

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Mark G. Schneider, Mark G. Schneider, PLLC, and Paul R. Oppegard, Smith  
Bakke Oppegard Porsborg Wolf, Counsel for Plaintiff.

Edna S. Bailey, Wilson Elser Moskowitz Edelman & Dicker, and Patrick H.  
O'Neill, Jr., O'Neill & Murphy, LLP, Counsel for Defendant.

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**I. INTRODUCTION**

This matter is before the Court on the parties' cross-motions for summary judgment. [Docket Nos. 25, 29] Also before the Court is Defendant's Motion to Strike Portions of Plaintiff's Reply Brief in Support of Her Motion for Summary Judgment or, Alternatively, for Leave to File a Sur-Reply. [Docket No. 48] The Court heard oral argument on November 9, 2007.

**II. BACKGROUND**

## A. General Background

Plaintiff Karolyn Eastman was employed from January 24, 1994, until August 2, 2002, as a Senior Engineering Project Leader with Polaris Industries, Inc. (“Polaris”) in Roseau, Minnesota. (Administrative Record (“AR”) 1050-51.)

As part of her employment with Polaris, Plaintiff was provided long term disability (“LTD”) coverage as part of an ERISA-governed Employee Welfare Benefits Plan (the “Policy”). Defendant The Prudential Insurance Company of America (“Prudential”) underwrote Plaintiff’s LTD coverage pursuant to the terms of Policy. (AR 17-58) Polaris was the Plan sponsor and Plan administrator. (Id. 51.) Prudential was the claims administrator and supplier of Plan benefits. (Id. 52.)

## B. The LTD Policy

Under the terms of the LTD Policy, Defendant, as claims administrator, “has the sole discretion to interpret the terms of the Group Contract, to make factual findings, and to determine eligibility for benefits. The decision of the Claims Administrator shall not be overturned unless arbitrary and capricious.” (AR 52.) Under the Policy, a claimant is disabled when

- you are unable to perform the *material and substantial duties* of your *regular occupation* due to *sickness* or *injury*; and
- you have a 20% or more loss in your *indexed monthly earnings* due to that *sickness* or *injury*.

After 24 months of payment, you are disabled when Prudential determines that due to the same sickness or injury, you are unable to perform the duties of any *gainful occupation* for which you are reasonably fitted by education, training, or experience.

(AR 27.) Under the Policy, Eastman was required to provide proof of claim, including “[t]he date your disability began;” “[a]ppropriate documentation of the disabling disorder;” and “[t]he extent of your disability, including restrictions and limitations preventing you from performing your regular occupation or gainful occupation.” (*Id.* 41.) In addition, the Policy contains the following limitation:

Disabilities which, as determined by Prudential, are due in whole or part to *mental illness* have a limited pay period during your lifetime.

The limited period for mental illness is 24 months during your lifetime.

(AR 36.) Mental illness is defined as follows:

*Mental illness* means a psychiatric or psychological condition regardless of cause. Mental illness includes but is not limited to schizophrenia, depression, manic depressive or bipolar illness, anxiety, somatization, substance related disorders and/or adjustment disorders or other conditions. These conditions are usually treated by a mental health provider or other qualified provider using psychotherapy, psychotropic drugs or other similar methods of treatment as standardly accepted in the practice of medicine.

(*Id.*)

Finally, the Policy affords Defendant the right to recover overpayments

due to receipt of deductible sources of income by the insured, such as disability payments under the Social Security Act. (AR 31, 42.)

**C. Plaintiff's Illness and Her Policy's Coverage**

**1. Prudential's Initial Approval of Eastman's LTD Claim**

Beginning on August 2, 2002, Eastman began receiving short term disability ("STD") benefits, which lasted six months. (AR 89-90.)

On February 5, 2003, Plaintiff applied for LTD benefits through Prudential. (AR 1033-54.) Plaintiff's claim submission was supported by an Attending Physician's Statement completed by her primary care physician, Dr. Ralph Herseth, M.D. (Id. 1041-43.) Herseth diagnosed Plaintiff with major depression, generalized anxiety disorder, and multiple physical symptoms secondary to her mental disorders, including cognitive function difficulty, extreme fatigue, multiple areas of myalgia, and severe insomnia. (Id. 1041, 1043.) Herseth opined that Eastman retained medium level functional capacity. (Id. 1041.)

On March 6, 2003, Herseth recorded his impression that Eastman suffered from "1. Major depression. 2. Panic disorder with agoraphobia. 3. Fibromyalgia" and opined, "I think the component of fibromyalgia in this lady is a big factor; it seems to really be disabling her." (AR 931.)

On April 3, 2003, Josephine Malysz, RN, a psychiatric nurse, conducted a clinical psychiatric review of Eastman's file for Prudential. (AR 62-63.) In her

analysis, Malysz found, in pertinent part:

A review of above documentation reveals the clmt experiencing multiple stressors including Father/dementia, mother/serious illness, new marriage, hx of severe domestic violence in previous marriage, multiple health problems and a heavy work load when she experienced an incident a[t] work that resulted in back pain and caused [claimant to be out of work]. The clmt attempted a part time rtw but was not able to handle it.

\* \* \*

Both Dr. Herseth's recent notes and the recent ov notes from the therapist indicate the clmt has made progress in her psychiatric condition and she is beginning to stabilize, the clmt con't to experience physical problems including fibromyalgia\*which will need further review by the clinical team.

\* \* \*

As of 2/02 the therapist notes indicate sleeping better, anxiety/panic symptoms are decreasing in intensity/frequency. Dr. Herseth['s 3/03 ov notes improvement in sleep, forgetting things, main complaint is aching/fibromyalgia component is big factor in disabling her.

It appears due to multiple psychiatric sx's the clmt was not able to rtw but it appears she is beginning to improve.

(AR 62-63.)

On April 4, 2003, Defendant approved Plaintiff's disability claim, effective January 29, 2003. (AR 64, 151-152.) Chastity Mallory, the claim manager, approved the disability claim, because "EE meets def. of TD at this time due to psych condition therefore will approve LTD through 5/31/03 and f/u w/EE that begins to receive appropriate care w/psychiatrist." (AR 64.) She also noted,

“Will also f/u PE findings to determine if supports TD for EE’s physical complaints of fibromyalgia.” (Id.)

On June 3, 2003, Eastman asked Herseth to test for fibromyalgia because “[h]er concern is that her disability covers her for 2 years for depression, but it covers her until age 64 for fibromyalgia.” (AR 910.) Herseth opined, “I am hoping that by the time 2 years have gone by, she has now only been in the long term disability for 3 months, that a lot of these issues have resolved.” (Id.) Herseth wrote, “She truly has not had symptoms that would warrant a complete workup, but I have agreed to go ahead and test it.” (AR 910.)

## **2. First Termination and Reinstatement of Eastman’s Benefits**

On September 22, 2003, Mary Ann DeSantis, RN, conducted a follow-up review of Plaintiff’s file and concluded that the intensity of her psychiatric treatment did not reflect a significant psychiatric disorder. (AR 66.) DeSantis continued, “However, as fibromyalgia has a strong psych component, would obtain 8/15/03 OV note and beyond from Dr Hussain, and Brenda[] King’s OV notes, and return to clinician for continued psych review.” As for the possibility of fibromyalgia, DeSantis opined, “Unless clmt has a rheumatologic disorder which needs tx, it does not appear she would remain impaired due to fibromyalgia. Clmt is to see rheumatologist Dr Lessard 9/29/03 (initially, appt was 9/04/03) and we should wait for report of that eval to complete fibromyalgia

review.” (Id.)

On September 29, 2003, James A. Lessard, M.D., conducted a rheumatology consultation on Eastman. (AR 458-63.) Lessard’s impression was “[f]ibromyalgia – this is undoubtedly the cause of her current aches and pains, probably caused by if not aggravated by [her history of depression and anxiety, and also the panic attacks.]” (AR 462-63). He noted that “all” of Eastman’s “tender points” had a “3 to 4+ with a positive jump sign.” (AR 462.)

By letter dated October 30, 2003, Defendant terminated Plaintiff’s LTD benefits effective November 1, 2003, based on an “absence of any medical documentation to support an impairment from your regular job duties due to fibromyalgia or depression.” (AR 142-144.)

Plaintiff, through counsel, submitted an appeal of Prudential’s decision on December 31, 2003. (AR 810-15.) The request was based on the assertion that Eastman was disabled “because of the combination of her depression/anxiety and fibromyalgia” and stated that the trigger point test constituted objective evidence of impairment by fibromyalgia; however, the appeal letter focused on evidence of Eastman’s disability due to mental illness. (Id. 813.) For example, the appeal noted that on November 21, 2003, Herseth opined, “I do feel this lady has major depression with anxiety and she has fibromyalgia, which is maybe secondary; the **depression is definitely overwhelming.**” (Id. (emphasis added in appeal letter).)

On January 15, 2004, Defendant referred Eastman's file to psychiatric consultant, psychiatrist Dr. Stephen Gerson, M.D., for analysis. (AR 69, 701-21.) Gerson contacted Eastman's treating psychiatrist, Dr. Shakeeb Hussain, M.D., on February 17, 2004. (AR 722-23, 728.) Hussain had treated Eastman since April 29, 2003. (Id. 722.) Hussain opined that Eastman was able to return to work part-time and had been able to do so for the previous couple of months; however, he also opined that Eastman should receive electroshock therapy and intensive psychotherapy. (Id.) Hussain also indicated that Eastman's depression and stressors, such as the death of Eastman's father, made her fibromyalgia worse. (Id.) (However, in a letter to Hussain summarizing their conversation, Gerson states that Hussain opined "that fibromyalgia made the depression worse." (Id. 728.))

Gerson also contacted Dr. Brenda King, Ph.D., Eastman's treating therapist who had treated Eastman since February 24, 2003. (AR 724-25.) King opined that Eastman was disabled from performing her occupation due to depression and ongoing psychiatric impairment. (Id. 724, 726.)

In his February 15, 2004, report, Gerson opined that Plaintiff was impaired from her position as a result of her psychiatric conditions and might be impaired indefinitely unless she received more aggressive treatment. (AR 702-21). Gerson reviewed and analyzed medical records from Dr. Harold E. Randall, Ph.D.,



Eastman's psychologist from October 22, 2002 through February 27, 2003, when treatment was transitioned to King; Lessard; Herseth; and King. Gerson also addressed the question of whether Eastman's psychiatric condition was impacting her fibromyalgia:

Yes . . . note Dr. Herseth and Psych providers in his note of 3/28/03 felt there was an interplay, alleged fibro pain making psych symptoms worse. Moreover, medical records seemed to indicate that the claimant's perception of pain and discomfort was heightened in concert with subjective reports of stress intolerance, increased sleep disturbance and increased anxiety symptoms.

(AR 721.)

On March 1, 2004, based on Gerson's assessment, Defendant reinstated Plaintiff's disability benefits effective November 1, 2003, based on psychiatric impairment. (AR 70, 136-37.) The reinstatement letter recounted the 24-month mental illness limitation in the policy. (Id. 137.)

### **3. Social Security Disability Benefits**

On May 28, 2004, Herseth completed a Treating Physician Medical Opinion Statement, in conjunction with Eastman's application for Social Security disability benefits. (AR 607-13.) Herseth noted that Eastman's diagnosis was major depression and fibromyalgia (id. 607) and opined that Eastman could not work at even a sedentary level because her "mental status would not allow" (id. 611). He also noted that, with regard to her "exertional limitations" Eastman

“develops fatigue increase with most activity” and, with regard to “postural limitations,” she “can do all these functions physically but tolerance is not there.” (Id. 607-09.)

On October 27, 2004, Plaintiff was approved for social security disability benefits (“SSDB”), with a disability onset date of August 1, 2002. (AR 594-601.) The Social Security Administrative Law Judge (“ALJ”) held that Plaintiff was disabled under the Social Security Act. (Id. 601.) Eastman had claimed disability based on “fibromyalgia, depression and anxiety.” (Id. 598.) The ALJ found that “[t]he medical evidence establishes that the claimant has severe depression, anxiety, and fibromyalgia.” (Id. 600.) However, when discussing the medical evidence and Eastman’s limitations, the ALJ only discussed Eastman’s mental illnesses. The ALJ opined that “[t]he medical records well document claimant’s history of depression and anxiety, with increasing difficulty leaving the home.” (Id. 599.) The ALJ discussed records from King and Herseth, noting that Herseth opined that “claimant’s mental status would not allow the performance of full-time work.” (Id.) With respect to Plaintiff’s impairment, the ALJ stated:

While the specific limitations appear to be somewhat out of proportion of the medical records, the undersigned generally accepts the opinion of claimant’s treating professionals and accepts that claimant’s depression and anxiety result in marked difficulties in maintaining concentration, persistence or pace and precludes the performance of even simple, repetitive tasks involving more than brief or superficial contact with others on a sustained basis.

Claimant cannot be expected to sustain the mental demands of work eight hours per day, five days per week or the equivalent thereof. Claimant would need more breaks, more days off than are normally afforded in the work place and is not considered to be vocationally reliable given the severity of her mental impairments.

Accordingly, claimant cannot be expected to perform her past relevant work or any other work existing in significant numbers in the national economy pursuant to Social Security Ruling 96-8p, and is disabled within the meaning of the Social Security Act.

(AR 599.) The ALJ's finding of disability is based on Eastman's mental illnesses.

#### **4. Termination of Benefits Due to Mental Illness Limitation**

Herseth completed a follow-up Attending Physician Statement for Prudential on December 8, 2004, stating that Eastman was not able to return to work because of her "mental function" and stated that the "Nature of Medical Impairment (i.e., loss of function)" was severe depression. (AR 662-63.)

On January 25, 2005, Defendant applied the Policy's 24-month mental illness limitation and terminated Plaintiff's LTD benefits effective January 29, 2005. (AR 127-129.) The termination letter explained, "Since your diagnosis of Major Depressive Disorder is considered a psychiatric illness[], you are entitled to 24 months of LTD benefits." (Id. 128.)

On July 21, 2005, Plaintiff appealed the termination, claiming that she "suffers from severe and debilitating fibromyalgia which renders her disabled. This is without taking into consideration her depression/anxiety." (AR 553-57.)

On May 13, 2005, Herseth responded to a questionnaire from Plaintiff's counsel regarding her fibromyalgia condition. (AR 385-87) Herseth opined that "objective signs/symptoms in Ms. Eastman's case substantiate the diagnosis of fibromyalgia." (Id. 385-86.) He noted that "[f]ibromyalgia does not qualify as a mental illness." (Id. 386.) With respect to Plaintiff's continuing complaint of fatigue, Herseth stated, "I guess I do not see that as being [a] symptom related to fibromyalgia alone. Certainly the symptom of fatigue is a primary, or commonly found, symptom[] relating to depression and the extreme fatigue that [Plaintiff] experiences I would attribute more to depression than to fibromyalgia." (Id.) With respect to Plaintiff's symptom of pain, Herseth stated, "Severe pain is certainly the most common symptom [] of fibromyalgia, and I do contribute [Eastman's] symptoms of pain to fibromyalgia. I do not see that as a symptom of depression." (Id.) Herseth opined

At the time I filled this questionnaire out I did feel that her mental status certainly was limiting basically any of her abilities as far as being gainfully employed. It would be my feeling that if you[] were going to try to make a decision whether the fibromyalgia was physically limiting her at this point, it might be wise to have functional capacities assessment done as that is certainly a much better assessment of physical disability. I do not feel that I could make a determination of her disability based on physical findings alone.

(Id.) Also, "Eastman's complaints of disabling pain and fatigue traceable to her fibromyalgia condition [are] credible and based on medical evidence." (Id.) He

also stated that he did “not feel [Eastman’s] fatigue is related solely to her fibromyalgia condition,” but “[c]ertainly her fatigue has been severe at times and I do feel has prevented her from engaging in any regular employment.” (Id.) With respect to the interrelationship of depression and fibromyalgia, Herseth stated:

I do feel, regardless of the c[ause] and effect on relationship between fibromyalgia and depression, that she is incapable of anything other than intermittent ‘as tolerate’ employment. Unfortunately, I don’t think you can separate these things out clearly enough so that you can say one alone causes this situation to be.

(AR 386-87.) Finally, Herseth opined that there was no evidence that Eastman “has been ‘malingering’ or in any way seeking any type of secondary gain regarding her illnesses.” (Id. 387.)

On July 20, 2005, Herseth provided another letter to Eastman’s counsel. (AR 388.) He again opined that he could not separate the symptoms from her fibromyalgia and her depression. (Id.) He concluded, “Overall I feel, in the last few months, her depression has been fairly stable. It appears that her fibromyalgia is what waxes and wanes and it appears to be related somewhat to her level of activity.” (Id.)

Herseth referred Eastman to Step Ahead Therapy where she received physical therapy for her fibromyalgia between August 8, 2005, and October 31, 2005. (AR 263.) Her treatments included myofascial release. (Id.)

Prudential referred Plaintiff's file and appeal to Dr. Joel M. Shavell, D.O., a rheumatologist, for independent analysis and assessment of Plaintiff's level of function with respect to fibromyalgia. (AR 72, 123-24.) On August 22, 2005, Shavell provided his opinion based on his assessment of Eastman's file, including records from her counsel, Herseth, Randall, King, Hussain, Lessard, and Drs. Tsibulsky, Anderson, and Thompson who conducted Northwestern Psychiatry and Mayo Clinic psychiatry evaluations. (Id. 269-72.)

Shavell stated that

there is no evidence of any physical findings that limit her from any of her work-related activity. . . . The complaint that she seemed to have was pain in the shoulders and the elbows and the hips, which was diagnosed as fibromyalgia, but there was no evidence throughout the entire chart of any abnormal physical findings, limitation of motion, inability to function on a physical basis, or any long-term organic disease that would require her to be off work.

(Id. 271.) He noted that the consensus of her treating physicians was that she predominantly suffered from panic disorder, agoraphobia, and major depression, and when she lost control, experienced increased anxiety, resulting in pain and medical problems. (Id.) As to her mental illnesses, Shavell thought that Eastman "was well evaluated and undertreated." (Id.)

Shavell opined that Eastman

is not impaired from any physical point of view whatsoever. In reviewing the charts and reviewing the information that was given to me, none of the physicians have ever made an attempt or thought

about making an attempt to establish a physical limitation of this claimant. There are no reports of physical limitation, or limitation of motion of the joints. There are no physical reports of limitations of muscle strength or range of muscle strength. There is absolutely nothing to indicate that she has any severe physical disabilities which would entail that she not work. All of the opinion was rendered with evaluations and very little treatment. No laboratories studies defined it, and no x-rays defined it, including doctor's notes and no treatments defined any limitation or any organic disease whatsoever. After review of the medical records, it is my opinion that she is able to return back to her normal work activities in a full time capacity without any restrictions.

(AR 272.)

On August 31, 2005, Defendant upheld its decision to terminate Plaintiff's benefits, because Plaintiff had exhausted her benefits for mental illness-based disability and had no physical limitations preventing her from returning to work independent of her psychiatric conditions. (AR 118-21.) Prudential's letter acknowledged that Eastman was diagnosed with fibromyalgia but further asserted that her medical file contained "no mention of any abnormal physical findings, limited motion or an inability to function on a physical basis. There are no physical reports of limitation on muscle strength or range of muscle strength. The documentation in file does not support an impairment that would prevent Ms. Eastman from performing her regular occupation with any restrictions." (Id. 119-20.) Prudential further stated that "[a]lthough her doctors are indicating she has fibromyalgia, her symptoms appear to be due, in whole or part, to her

underlying mental illness for which she has exhausted all benefits payable due to the Group Policy Benefit Limitation.” (Id. 120.)

### **5. Eastman’s Second Request for Reconsideration**

On December 6, 2005, Plaintiff saw another rheumatologist, Dr. James F. Hatch, M.D. (AR 255-59.) Hatch concluded that “[f]ibromyalgia is clearly present but the majority of her aches and pains that really bother her are not due to fibromyalgia, i.e. bilateral trochanteric bursitis of the hips and bilateral plantar fascitis.” (Id. 257.) Hatch’s notes provide, “The patient was advised that fibromyalgia does not have to be a chronic disease and that as far as I thought she should be able to correct the above problems as suggested.” (Id. 257-58.)

On February 22, 2006, Eastman submitted a second appeal of Prudential’s termination and included Hatch’s report. (AR 260-64.)

Defendant requested an external file review from a physical medicine and rehabilitation specialist, Dr. April Campbell, M.D. (AR 78.) On March 26, 2006, Campbell provided a seven-page analysis. (AR 176-82.) She reviewed records from Herseth, King, Randall, Hussain, Gerson, Tsibulsky, Anderson, Thompson, Hatch, and Shavell, among others. (Id.) She specifically discussed records from Herseth, Hussain, Lessard, and Hatch.

Campbell opined that while Eastman was disabled by “severe mental illness,” she was not disabled by fibromyalgia. (AR 182.) Campbell concluded



that “[t]he fibromyalgia is clearly a secondary issue, and in fact, I rather doubt that she has true fibromyalgia.” (Id.) She concluded that

[t]here is no evidence of any functional impairments involving Ms. Eastman. She has consistently had a normal musculoskeletal exam, and all of her complaints have been subjective in nature. There have been virtually no objective findings, either on physical exam or on imaging studies, to indicate evidence of ongoing pathology. The tender point examination for fibromyalgia is considered subjective testing, since it relies on the claimant to give a subjective complaint of pain.

(AR 180.) She opined that Plaintiff’s continuing reports of chronic pain “could be consistent with malingering and/or efforts at obtaining secondary gain,” particularly in light of the fact that Eastman began complaining of more pain when she became concerned that her LTD for her psychiatric claim would be discontinued after two years. (Id. 181.) Campbell also opined that “[f]ibromyalgia as a disease entity continues to be a controversial one. The diagnosis is based entirely on subjective symptoms that anyone can replicate, and in the absence of any objective findings, I feel that Ms. Eastman could return to the essential duties of her job, or any occupation from a musculoskeletal point of view.” (Id. 182.)

In a letter dated April 14, 2006, Defendant upheld its termination of Plaintiff’s LTD benefits on the grounds that, aside from her psychiatric illness, the records did not support any other disabling condition. (AR 79-80, 109-13.)

The letter recounted Eastman's medical records, including a discussion of Hatch's treatment. Defendant stated: "Our review of the file indicated that the medical records did not support the presence of a medical impairment at any time after January 29, 2005. Further, Ms. Eastman would not be eligible for benefit payments for any subsequent medical conditions, including the conditions noted by Dr. Hatch as of February 2006, as her coverage under the policy had lapsed." (Id. 112.) Defendant concluded, "After reviewing Ms. Eastman's medical records, we maintain that documentation does not support a physical impairment that would preclude her from returning to work. In the absence of medical evidence to document a non-psychiatric impairment that would preclude Ms. Eastman from working as of January 29, 2005, we are unable to pay additional benefits." (Id.)

## **6. Overpayment of Benefits**

Starting in April 2006, Defendant also began its attempts to collect overpayments based on Plaintiff's retroactive receipt of SSDB, as provided in the Policy and in the Reimbursement Agreement signed by Eastman on April 15, 2003. Prudential computed overpayment in the amount of \$27,189.68. (AR 76-77, 81-87, 103-06, 164-71, 579-81.)

## **D. Procedural History**

On October 12, 2006, Eastman filed a Complaint against Prudential in this

Court, requesting reinstatement of her LTD benefits from January 29, 2005, forward. Defendant filed a counterclaim for breach of contract requesting that Eastman repay overpayment of her disability benefits because Prudential is entitled to reimbursement for the amounts paid by the Social Security Administration for the period of January 29, 2003, through January 29, 2005. Both parties have now moved for summary judgment.

Prudential has also moved to strike portions of Eastman's reply brief or, in the alternative, for leave to file a sur-reply. [Docket No. 48] Eastman opposes this motion. [Docket No. 52] Although the Court finds nothing improper in Eastman's reply, it will permit Prudential to file its sur-reply in order to ensure that the parties' positions are fully expressed to the Court.

### **III. DISCUSSION**

#### **A. Summary Judgment Standard**

Summary judgment is appropriate if, viewing all facts in the light most favorable to the non-moving party, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The party seeking summary judgment bears the burden of showing that there is no disputed issue of material fact. Celotex, 477 U.S. at 323. Summary judgment is only appropriate when "there is no dispute of fact and where there exists only one conclusion."

**B. Standard of Review for of Prudential's Decision**

**1. General Standard of Review**

Under ERISA, a plan beneficiary has the right to judicial review of a benefits determination. See 29 U.S.C. § 1132(a)(1)(B). When a policy provides the plan administrator with discretionary authority to determine eligibility for benefits, the abuse of discretion standard generally applies. Cash v. Wal-Mart Group Health Plan, 107 F.3d 637, 641 (8th Cir. 1997). Here, Plaintiff does not dispute that the Policy grants Defendant discretionary authority to determine her eligibility for LTD benefits.

Under the abuse of discretion standard, the plan administrator's decision to deny benefits must be affirmed if "a reasonable person could have reached a similar decision, given the evidence before him, not that a reasonable person would have reached that decision." Clapp v. Citibank, N.A. Disability Plan, 262 F.3d 820, 828 (8th Cir. 2001) (emphasis in original) (quotation omitted). Review of the administrator's decision is limited to the administrative record that was before the plan administrator at the time that the final benefits decision was made. Cash, 107 F.3d at 642. A decision is reasonable if it is supported by substantial evidence, meaning "more than a scintilla but less than a preponderance." Clapp, 262 F.3d at 828 (citation omitted). A court "will not

disturb a decision supported by a reasonable explanation even though a different reasonable interpretation could have been made.” Id. (citation omitted).

“To obtain a less deferential review, [a plaintiff] must present material, probative evidence demonstrating that (1) a palpable conflict of interest or a serious procedural irregularity existed, which (2) caused a serious breach of the plan administrator’s fiduciary duty to her.” Woo v. Deluxe Corp., 144 F.3d 1157, 1160 (8th Cir. 1998) (citation omitted.) The conflict or procedural irregularity must have must be egregious enough to create “a total lack of faith in the integrity of the decision-making process.” Layes v. Mead Corp., 132 F.3d 1246, 1251 (8th Cir. 1998) (citation omitted). If the claimant meets both prongs of the Woo test, including a showing “that the conflict or irregularity has some connection to the substantive decision reached,” the Court will adjust the deference given to the decision of the plan administrator, depending on the seriousness of the conflict or irregularity. Woo, 144 F.3d at 1161-62 (citation omitted).

## **2. Analysis of Applicable Standard of Review**

Eastman contends that the Court should review the Prudential’s decision to deny her coverage de novo, because Prudential has a palpable conflict of interest and committed four serious procedural irregularities when reviewing her claim.

**a. Structural Conflict of Interest**

Eastman asserts that Prudential has a conflict of interest because, as the plan insurer, it will receive a direct financial benefit from denying her claim. Even though Defendant acted as both claims administrator and the entity that supplies plan benefits, this fact alone is not enough to warrant heightened review. Chronister v. Baptist Health, 442 F.3d 648, 655 (8th Cir. 2006). Eastman cannot satisfy the second prong of the test on this basis because she has not shown that Prudential's "initial grant and later termination of [Eastman]'s disability benefits were tainted by any financial impact that those decisions may have had on [Prudential] as the plan-funding insurer." Id.

The Court holds that there is no structural conflict of interest warranting a heightened standard of review. However, the Court must still examine whether Eastman meets the first prong of the Woo test due to the existence of procedural irregularities.

**b. Serious Procedural Irregularities**

**i. Whether Prudential Ignored Objective Findings of Fibromyalgia**

In Prudential's October 30, 2003, termination letter, in which it concluded that Eastman was not disabled from mental illness or fibromyalgia, Prudential stated that Eastman's "diagnosis of fibromyalgia is not associated with an

impairment rating due to lack of objective findings on which to base an impairment.” (AR 143.) Prudential’s January 25, 2005, termination letter did not mention fibromyalgia, instead merely stating that Eastman had exhausted her “24 months of benefits for her psychiatric illnesses.” (AR 128.) In its April 14, 2006, denial of Eastman’s second appeal, Prudential dismissed the disabling nature of her fibromyalgia condition based on its conclusion that her “physical exams have been negative for any pathology to the musculoskeletal system;” the reviewing physician opined that the fibromyalgia diagnosis was based on an entirely subjective basis; the file review revealed “no evidence of any functional impairment;” and her “primary diagnosis has been a psychiatric one.” (AR 111-12.) Defendant concluded that “Eastman’s complaints related to fibromyalgia are a secondary issue and she could return to the duties of a regular occupation or any occupation from a musculoskeletal point of view.” (Id. 112.)

Plaintiff argues that Defendant erred in denying her disability claim due to a lack of objective findings of fibromyalgia, because the results of the trigger-point tests conducted by Herseth, through his statement that Eastman “does have complaints of pain in 11 of the 18 sites on concern,” (AR 385) and the reports of two rheumatologists are objective medical evidence of the existence and severity of her fibromyalgia. She cites to Lessard’s September 29, 2003 report stating that all of her tender points were “3 to 4+ with a positive jump sign,” and that

fibromyalgia “is undoubtedly the cause of her current aches and pains, probably caused by if not aggravated by [depression, anxiety, and panic attacks],” and to Hatch’s December 6, 2005 report that states that “[f]ibromyalgia is clearly present, but the majority of her aches and pains that really bother her are not due to fibromyalgia.” (AR 462, 257). See Chronister v. Baptist Health, 442 F.3d 648, 656 (8th Cir. 2006) (holding that “eighteen point ‘trigger test’ . . . qualifies as a clinical examination standardly accepted in the practice of medicine,” and that “trigger-point test findings consistent with fibromyalgia constitute objective evidence of the disease”) (citations omitted).

Prudential asserts that it had no reason to mention Eastman’s fibromyalgia in its termination of benefits letter that was effective January 25, 2005, because her LTD claim had only been approved on the basis of disability from a mental illness. (AR 136-37.) Although Prudential asserts that Eastman’s appeal of the October 2003 termination of benefits was based solely on her mental illnesses, the Court notes that she did assert that she was unable to work “because of the combination of her depression/anxiety and fibromyalgia,” and also argued that the trigger point test constituted objective evidence of her impairment by fibromyalgia. (AR 810-15.) However, the appeal did focus on Eastman’s impairment due to mental illness, for example, noting that Herseth had opined that “this lady has major depression with anxiety and she has fibromyalgia,



which is maybe secondary; the **depression is definitely overwhelming.**" (AR 813 (emphasis added in appeal letter).) Prudential reinstated Eastman's benefits based on the opinion of Gerson, a psychiatric specialist, who opined that Eastman was fully and possibly indefinitely impaired from her regular occupation due to her psychiatric conditions. (AR 70, 136-37, 702-21.)

Prudential asserts that it accepted that Eastman had fibromyalgia (AR 112, 120), but it required objective evidence of the disabling quality of or impairment due to her fibromyalgia. (AR 41, 67, 74.) Prudential notes that several of her physicians, including Randall and King, attribute her pain to her psychiatric conditions and diagnosed her with somatoform pain disorder. (AR 425 (King's March 24, 2003 diagnosis of "307.80 Chronic pain with associated psychological and physiological factors"), 429 (same), 462-63 (Lessard's September 29, 2003 impression of fibromyalgia "probably caused by if not aggravated by [depression, anxiety, and panic attacks]"), 800-09 (Randall's December 12, 2002 assessment of "[p]sychological facts affecting physical function (skeletal muscle headache and skeletal muscle pain)").)

Eastman is correct that the results of her trigger-point test constitute objective evidence of a diagnosis of fibromyalgia. Furthermore, it may be unreasonable for an insurer to require that medical opinions of impairment or disability be based on evidence more "objective" than a trigger-point test and the

claimant's reports of pain. However, this is not a case in which Prudential rejected the opinions of Eastman's medical providers that she was disabled due to fibromyalgia because their opinions were not based on objective medical evidence. Rather, there is no evidence in the record that Eastman was disabled or subject to particular limitations due to her fibromyalgia. Herseth, who conducted the trigger point test, stated that although he believed she was disabled due to mental illness he was unable to make a determination of her disability based on fibromyalgia. (AR 385-86.) Eastman cites to no restrictions from her medical providers restricting her ability to work based on her diagnosis of fibromyalgia; nor does she provide evidence that any of them found her disabled as a result of her fibromyalgia. In such a case, Prudential did not commit a serious procedural irregularity by requiring objective evidence of the disabling nature of Eastman's fibromyalgia. See, e.g., Johnson v. Metro. Life Ins. Co., 437 F.3d 809, 814 (8th Cir. 2006) (holding plan can require objective evidence that fibromyalgia "was so significant or severe that it would preclude [claimant] from performing her job"); Pralutsky v. Metro. Life Ins. Co., 435 F.3d 833, 840 (8th Cir. 2006) (upholding plan's denial of benefits to claimant with fibromyalgia, when "[g]iven th[e] potential for varying impact of the condition among different patients, [plan] was requesting objective information to verify that this claimant, whom it acknowledged was afflicted with fibromyalgia, was disabled to the point that she

could not perform even sedentary or light-duty work”); Boardman v. Prudential Ins. Co. of Am., 337 F.3d 9, 15 n.5 (1st Cir. 2003) (holding that, although it is unreasonable to require objective medical evidence to establish existence of chronic fatigue syndrome and fibromyalgia, it was not unreasonable for insurer to accept diagnosis but require “objective evidence that these illnesses rendered her unable to work [because] [w]hile the diagnoses of chronic fatigue syndrome and fibromyalgia may not lend themselves to objective clinical findings, the physical limitations imposed by the symptoms of such illnesses do lend themselves to objective analysis”), cited with approval in Pralutsky, 435 F.3d at 841.

**ii. Whether Prudential Considered Eastman’s Pain Allegations**

Eastman asserts that Prudential committed a serious procedural irregularity by ignoring her subjective complaints of pain. She cites to Prudential’s August 31, 2005 denial letter, in which it stated, “Review of Ms. Eastman’s medical records indicates that she reported pain in her shoulders, elbows and hips and as a result was diagnosed with fibromyalgia by Dr. Herseth (primary care physician). Ms. Eastman’s treating physicians have attributed her complaints of pain to her fibromyalgia diagnosis, however there is no mention of any abnormal physical findings, limited motion or an inability to function on a

physical basis. . . . The documentation in file does not support an impairment that would prevent Ms. Eastman from performing her regular occupation with any restrictions.” (AR 119-20.)

Eastman notes that, while a plan administrator can make credibility determinations regarding a claimant’s subjective reports of pain, it cannot “deny benefits simply because the only evidence of a disabling condition is subjective evidence.” Collins v. Cont’l Cas. Co., 87 Fed. Appx. 605, 607 (8th Cir.2004) (unpublished) (citation omitted).

In this case, Prudential did address Eastman’s complaints of pain and acknowledged her diagnosis of fibromyalgia. However, consistent with the Policy, Prudential required Eastman to provide proof of the extent of her disability. Eastman did not provide evidence from any medical provider that she was unable to work due to fibromyalgia, as opposed to her mental illnesses. As the Court concluded in the previous section, consistent with the Eighth Circuit opinions in Johnson and Pralutsky, Prudential did not commit a serious procedural irregularity by requiring such proof.

**iii. Whether Prudential Considered All Evidence Provided by Eastman Before Issuing a Final Decision to Deny LTD Benefits**

Eastman contends that Prudential refused to consider various medical records and opinions, specifically the opinion of Hatch.

On December 6, 2005, Hatch diagnosed Eastman with fatigue due to nonrestorative sleep; bilateral trochanteric bursitis; bilateral plantar fasciitis (leading to an altered gait); myofascial pain in her upper back and neck probably due to posture problems; and fibromyalgia. (AR 257.) He went on to opine that “the majority of her aches and pains that really bother her are not due to fibromyalgia.” (Id.) In Prudential’s April 14, 2006 letter denying Eastman’s second appeal, Prudential stated that “Eastman would not be eligible for benefit payments for any subsequent medical conditions, including the conditions noted by Dr. Hatch as of February 2006, as her coverage under the policy had lapsed.” (AR 112.) Despite Prudential’s statement, it did provide a one-paragraph recitation of Hatch’s medical treatment and noted that Hatch’s records “concluded an impairment that would prevent Ms. Eastman from returning to work was not documented.” (Id. 111.) Plaintiff claims that Defendant both mischaracterized this medical evidence and refused to consider it.

The Court concludes that Prudential did consider Hatch’s opinion, as it stated in April 14, 2006 letter. Additionally, Hatch’s records were submitted to Campbell, who reviewed them before rendering her final opinion. (Id. 179 (discussing Hatch medical records).) Prudential’s statement that, to the extent Hatch’s examination revealed “subsequent medical conditions,” coverage ended before there was evidence that these conditions existed does not amount to

ignoring the evidence submitted by Eastman. Moreover, Hatch did not opine that Eastman was disabled based on conditions other than mental illness and opined that Eastman “should be able to correct the above problems as suggested.” (*Id.* 258.)

Prudential did consider the evidence regarding Hatch, and the reports of its reviewers and its denial letters reveal that it considered the other evidence that Eastman provided. The Court concludes that Prudential did not commit a serious procedural irregularity by failing to consider all of the evidence provided by Eastman.

**iv.. Whether Prudential Committed a Serious  
Procedural Irregularity by Failing to Obtain an  
Independent Medical Examination or a  
Functional Capacity Evaluation**

Finally, Plaintiff claims that Defendant erred procedurally by failing to obtain an independent medical examination (“IME”) and a functional capacity examination (“FCE”). *See Payzant v. UNUM Life Ins. Co. of Am.*, 402 F. Supp. 2d 1053, 1062 (D. Minn. 2005) (holding insurer committed serious procedural irregularity by failing to obtain IME or FCE for claimant with fibromyalgia when insurer failed to speak with claimant’s primary care provider, who opined claimant was “unable to work” and “two primary doctors opined about the need for a functional evaluation”). She argues that despite opinions by Herseth,

Lessard, and Hatch confirming the diagnosis and severity of Eastman's fibromyalgia, Prudential merely relied on Shavell's file review of Eastman's medical records. Eastman notes that, in Herseth's May 13, 2005 letter to Eastman's attorney, Herseth stated, "It would be my feeling that if you[] were going to try to make a decision whether the fibromyalgia was physically limiting her at this point, it might be wise to have functional capacities assessment done as that is certainly a much better assessment of physical disability. I do not feel that I could make a determination of her disability based on physical findings alone." (AR 386.) Eastman asserts that, as in Payzant, this "statement was made in the context of documenting [Eastman's] inability to work" as opposed to in the context of determining whether Eastman was disabled. See Payzant, at 1063.

Prudential had three independent experts review Eastman's claim – a psychiatrist, a rheumatologist, and a physical medicine and rehabilitation specialist –, each of whom reviewed Eastman's entire file, as it existed at the time of his or her review, and Gerson contacted two of Eastman's treating physicians.

Given that not one of Plaintiff's physicians opined that she was disabled as a result of fibromyalgia, as opposed to psychiatric conditions, Prudential did not commit a serious procedural irregularity by failing to obtain an IME or FCE when it reviewed her medical file and involved two independent specialists in the review process. Cf. Clapp v. Citibank, N.A. Disability Plan (501), 262 F.3d 820,

828 (8th Cir. 2001) (holding no serious procedural irregularity when insurer failed to have rheumatologist or cardiologist review claim of cardiac impairment and fibromyalgia when there was evidence from primary care physician and treating cardiologist that claimant was not disabled, insurer spoke directly to treating doctors, and insurer tracked medical history for two years); Heaser v. Toro Co., 247 F.3d 826, 833 (8th Cir. 2001) (holding no procedural irregularity when insurer did not order IME when insurer reviewed claimant's medical records, contacted one of claimant's treating physicians, and ordered a review by a medical consultant specializing in the appropriate field).

The Court concludes that Prudential did not commit any serious procedural irregularity in its handling of Eastman's claim. Therefore, the Court will review Prudential's decision under the abuse-of-discretion standard.

### **C. Propriety of Prudential's Denial of Benefits**

#### **1. Interpretation of Policy Language**

The mental disability limitation provides: "Disabilities which, as determined by Prudential, are due in whole or part to *mental illness* have a limited pay period [of 24 months] during your lifetime."

Prudential appears to argue that the mental illness limitation means that, no matter how disabling a claimant's physical disability is, if a mental illness also contributes to her disability, the 24-month limitation applies. Prudential also



argues, however, that even if the Policy language were interpreted to require that, in order for the limitation to apply, the mental illness must be the but-for cause of the claimant's disability, it reviewed Eastman's claim under this standard and she was still subject to the mental illness limitation. From the Court's review of the record, it is apparent that Prudential reviewed Eastman's claim to determine whether, independent of her mental illness, she was still disabled.

The term "are due" is capable of a range of meanings, "ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other." Kimber v. Thiokol Corp., 196 F.3d 1092, 1100 (10th Cir. 1999) (interpreting term "due to"). ("A 'contributing cause' means [the condition] was a necessary, though not necessarily sufficient, cause of the . . . disability." Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dept. of Labor, 62 F.3d 1003, 1008 (7th Cir. 1995) (citation omitted).) "When a plan administrator is given authority to interpret the plan language, and more than one interpretation is rational, the administrator can choose any rational alternative." Kimber, 196 F.3d at 1100 (citation omitted). Thus, Prudential has the discretion to choose any rational interpretation of the mental illness limitation, within the range noted.

The Court concludes that Prudential's first proffered interpretation of the limitation, that the limitation applies if a mental illness is in any way disabling,

even if the physical illness is also independently disabling, is patently unreasonable. Under Prudential's reading, no matter how physically disabled a claimant is, she cannot obtain benefits beyond 24 months if she also has a mental impairment that in some way, no matter how slight, also contributes to her disability. Thus, given two claimants who are equally physically disabled, if the first claimant has no mental disability but the second claimant has, in addition to her complete physical disability, disabling depression, under Prudential's interpretation, the first claimant would receive lifetime benefits but the second claimant, who is even more disabled than the first, would lose benefits after 24 months. This interpretation eviscerates the meaning of "are due," even when read in conjunction with the phrase "in whole or part." Interpreting the plan language to punish claimants for having a mental disability in addition to an independently disabling physical condition is absurd and unconscionable.

The Court concludes any reasonable interpretation of the limitation requires that, at a minimum, the limitation applies only if without the contributing mental illness, the claimant's physical condition would not be independently disabling. The term "are due" means that the mental illness must be at least a contributing factor or cause of the claimant's disability. If the claimant is disabled even without consideration of the mental illness, then the mental illness is not a contributing cause of the disability — it is superfluous. If

the mental illness is a contributing cause of the disability, no matter how slight, such that, without the mental illness, the claimant would not be disabled, then the limitation applies. This interpretation is the only non-absurd interpretation of the limitation put forth by Prudential.

The Court now must determine whether a reasonable person, based on the evidence before Prudential, could have determined that Eastman was not disabled as a result of her fibromyalgia. In other words, the Court must decide whether it was an abuse of discretion to decide that, without regard to Eastman's mental illnesses, Eastman was not disabled.

## **2. Whether Plaintiff Is Disabled Due to Fibromyalgia**

### **a. SSDB Determination**

Eastman asserts that her SSDB determination supports a finding that she was disabled by fibromyalgia. While the ALJ did find that Eastman suffered from fibromyalgia, the ALJ did not find that the fibromyalgia was independently disabling. The ALJ never discusses the impairment allegedly caused by fibromyalgia. Instead, the ALJ's discussion of Eastman's impairment focused on Eastman's mental illnesses. (AR 599.) For instance, the ALJ noted Herseth's opinion that Eastman's "mental status would not allow the performance of full-time work," and concluded that Eastman "cannot be expected to sustain the mental demands of [full-time] work," and she would need excessive days off

“given the severity of her mental impairments.” (Id.) In any case, conclusions of the Social Security Administration are not binding on Prudential. Farfalla v. Mut. of Omaha Ins. Co., 324 F.3d 971, 975 (8th Cir. 2003).

**b. Campbell**

Eastman particularly attacks the opinion of consultant Campbell. Eastman argues that Campbell’s opinion is incompetent because she concluded that “[t]he tender point examination for fibromyalgia is considered subjective testing, since it relies on the claimant to give a subjective complaint of pain.” (AR 180.)

Eastman notes that Herseth opined that “objective signs/symptoms in Ms. Eastman’s case substantiate the diagnosis of fibromyalgia,” and, that the Eighth Circuit has held that trigger-point testing is objective evidence of fibromyalgia.

Defendant asserts that Campbell’s classifications of Eastman’s trigger points as subjective is irrelevant because the mere diagnosis of fibromyalgia does not establish disability. See Estok v. Apfel, 152 F.3d 636, 640 (7th Cir. 1998) (“It is not enough [in the SSDB context] to show that she had received a diagnosis of fibromyalgia with a date of onset prior to the expiration of the insured period, since fibromyalgia is not always (indeed, not usually) disabling.”) (citation omitted).

The Court agrees that Campbell’s opinion can be interpreted to improperly dismiss Eastman’s diagnosis of fibromyalgia based on the lack of “objective” test

results. However, Campbell did completely review Eastman's medical file and explained her reasoning for doubting Eastman's credibility. Moreover, in light of the fact that there is no opinion from any medical provider, treating or otherwise, the Eastman was disabled or subject to particular limitations due to her fibromyalgia, the Court cannot say that Campbell's dismissal of Eastman's fibromyalgia diagnosis rendered Prudential's decision an abuse of discretion when Prudential based its termination on the lack of evidence that Eastman's fibromyalgia was disabling.

**c. Treating Physicians**

In this case, the Policy placed the burden of proof on Eastman to establish her eligibility for benefits. (AR 41-42.) Eastman must provide written proof that demonstrates "the extent of your disability, including restrictions and limitations preventing you from performing your regular occupation or gainful occupation." (*Id.* 41.) The parties agree that Eastman is disabled and that Eastman has been diagnosed with fibromyalgia. However, the record contains no evidence regarding the extent of Eastman's impairment caused by fibromyalgia and no opinion by any medical provider that Eastman was disabled by fibromyalgia. See, e.g., Pralutsky v. Metro. Life Ins. Co., 435 F.3d 833, 840-41 (8th Cir. 2006) (upholding plan's denial of benefits to claimant with fibromyalgia, when "[g]iven th[e] potential for varying impact of the condition among different patients,

[plan] was requesting objective information to verify that this claimant, whom it acknowledged was afflicted with fibromyalgia, was disabled to the point that she could not perform even sedentary or light-duty work"). Instead, the record is replete with opinions by Eastman's treating physicians, and by consulting physicians, that Eastman's mental illnesses caused her disability.

Eastman's treating physicians provide support for Prudential's determination. None of Eastman's treating physicians rendered a clear opinion that her fibromyalgia was disabling. For instance, on December 8, 2004, Herseth opined that Eastman could not return to work as a result of her "mental function" due to severe major depression. (AR 663.) King opined that Eastman was disabled as a result of depression and related psychiatric impairment. (Id. 724, 726.) She also opined that Eastman suffered from a pain disorder with psychological and physiological factors. (Id. 425, 429.) Lessard opined that Eastman's depression and anxiety caused her fibromyalgia symptoms. (AR 462-63) Hatch opined that the majority of Eastman's aches and pains were not attributable to fibromyalgia and that Eastman "should be able to correct the . . . problems as suggested." (AR 257-58.) Additionally, as Prudential notes, even if Eastman's psychological conditions were of physical origin, the manifestation and symptoms of an illness trigger the applicability of the mental illness benefit limitation. Stauch v. Unisys Corp., 24 F.3d 1054, 1056 (8th Cir. 1994); Brewer v.

Eastman relies heavily on the opinion of Herseth. Eastman notes that, on March 6, 2003, Herseth opined that “the component of fibromyalgia in this lady is a big factor; it seems to really be disabling her,” and that on May 13, 2005, Herseth stated: “Severe pain is certainly the most common symptom [] of fibromyalgia, and I do contribute [Eastman’s] symptoms of pain of fibromyalgia. I do not see that as a symptom of depression.” She admits that he attributed her fatigue “more to depression than to fibromyalgia,” but argues that he admits her fibromyalgia also contributes to both her pain and fatigue: “Eastman’s complaints of disabling pain and fatigue traceable to her fibromyalgia condition [are] credible and based on medical evidence.”

Herseth clearly did regard Eastman as disabled, opining, “I do feel, regardless of the c[ause] and effect on relationship between fibromyalgia and depression, that she is incapable of anything other than intermittent ‘as tolerate[d]’ employment.” However, Herseth also was clear in his statement that he could not make a determination that she was disabled based on her physical ailments alone.

#### **d. Reviewing Physicians**

Additionally, three independent specialists reviewed Eastman’s file; none opined that she was disabled due to fibromyalgia; and two specifically opined

that she was not disabled due to fibromyalgia. Even if Herseth's opinion were interpreted to support Eastman's claim, Prudential was entitled to rely on the opinions of the reviewing physicians, particularly in light of the opinions of treating physicians Hatch, Lessard, and King:

Where there is a conflict of opinion between a claimant's treating physicians and the plan administrator's reviewing physicians, the plan administrator has discretion to find that the employee is not disabled unless the administrative decision lacks support in the record, or . . . the evidence in support of the decision does not ring true and is . . . overwhelmed by contrary evidence.

Coker v. Metro. Life Ins. Co., 281 F.3d 793, 799 (8th Cir. 2002) (citation omitted).

See also Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003)

("[C]ourts have no warrant to require administrators [of ERISA plans] automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation.") (footnote omitted).

**e. Conclusion**

Although the Court may not agree with Prudential's decision that Eastman was not disabled due to fibromyalgia, Prudential's determination that Eastman was subject to the 24-month mental illness limitation was not an abuse of discretion. A reasonable person, given the evidence in the record, could have



reached a similar decision. Therefore, Prudential is entitled to summary judgment on Eastman's ERISA claim.

**D. Defendant's Counterclaim for Recovery of SSDB**

Under the Policy, certain "deductible sources of income" must be subtracted from a claimant's LTD benefits. (AR 31.) These sources of income include disability payment under the Social Security Act. (Id.) Defendant paid Plaintiff the full amount of her gross LTD benefits from January 2003 through January 2005. Plaintiff, however, was awarded SSDB retroactive to January 2003 in the amount of \$1,393 per month. (Id. 579.) Eastman has not yet reimbursed Defendant for the overpaid benefits, despite the applicable Policy provision and a signed Reimbursement Agreement that required her to do so.

Defendant asks for summary judgment on its breach of contract claim in the amount of \$27,189.68. Eastman concedes that, if Prudential's motion for summary judgment is granted, an overpayment has been made; however, she objects to the amount of damages to which Prudential is entitled. Plaintiff argues that Prudential has failed to meet its burden of proof as to the amount of overpayment because it provides no citation to the administrative record to explain how it calculated an overpayment of \$27,189.68. In fact, the record does reflect both Eastman's Social Security award and Prudential's method of calculation. (See AR 76-77, 81-87, 103-06, 164-71, 579-81.) Eastman has pointed to

no genuine issue of material fact with regard to the amount of overpayment that she owes Prudential. Therefore, the Court grants summary judgment for Prudential on its claim for \$27,189.68.

Prudential also requests an award of attorney fees and prejudgment interest, but presents no argument explaining why it is entitled to attorney fees or prejudgment interest. Therefore, if Prudential seeks such an award, it must submit a memorandum to the Court within 30 days of the date of this Order explaining why it is so entitled. Eastman shall have 30 days from the date of the filing of Prudential's to submit a brief in opposition.

Accordingly, based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED:**

1. Defendant's Motion to Strike Portions of Plaintiff's Reply Brief in Support of Her Motion for Summary Judgment or, Alternatively, for Leave to File a Sur-Reply [Docket No. 48] is **GRANTED** as follows: Prudential is granted permission to file its proposed sur-reply [Docket No. 54].
2. Defendant's Motion for Summary Judgment [Docket No. 29] is **GRANTED** and Defendant is awarded judgment in the amount of \$27,189.68.
3. If Prudential seeks an award of attorney fees or prejudgment interest, it must submit a motion and memorandum to the Court within 30 days of the date of this Order explaining why it is so entitled. Eastman shall have 30 days from the date of the filing of Prudential's to submit a brief in opposition.

4. Plaintiff's Motion for Summary Judgment [Docket No. 25] is  
**DENIED.**

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: January 29, 2008

s / Michael J. Davis  
Judge Michael J. Davis  
United States District Court